71-405

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71- .

JOGUES EGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Dated: September 20, 1971.

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Sister Jogues Egan, Respondent in *Egan,* Oct. Term, 1971, No. 71-263, herewith files this Conditional Cross Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, which Cross Petition she asks be granted only if this Court grants the Petition of the United States filed in *Egan* Oct. Term, 1971, No. 71-263, in which she is respondent, or if this Court intends to hold the Government's Petition in that case but make the result therein abide the event in *Evans-Fishlowitz* Oct. Term, 1971, No. 71-256.

I.

OPINIONS BELOW.

The *en banc* opinion of the court of appeals and the panel opinion are not yet reported but are reproduced in

the Petition for a Writ of Certiorari filed by the Government in *Egan*, Oct. Term, 1971, No. 71-263, Appendices A and C, which opinions are incorporated herein by reference. An amendment to the court *en banc* opinion filed June 16, 1971, but not printed in the Government's Petition, is attached hereto as Appendix A.

II.

JURISDICTION.

The judgment and the *en banc* opinion of the Court of Appeals for the Third Circuit were filed on May 28, 1971 (App. A & B,[1] pp. 11, 73). The Government did not file its Petition for a Writ of Certiorari until August 20, 1971, which is 84 days after the judgment. If the Government had more than 30 days to file its Petition for a Writ of Certiorari, notwithstanding Rule 22(2) of this Court (providing that review of proceedings in criminal cases must be requested within 30 days), then this Conditional Cross Petition is also filed within time since on August 26, 1971, the 90th day, Sister Jogues Egan filed an Application for an Extension of Time to file a Conditional Cross Petition for a Writ of Certiorari. Mr. Justice Blackmun signed an order extending the time to file such Petition until and including September 22, 1971. If the Government's petition was timely, the jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).[2]

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1. Numerals followed by "A" are references to the appendix filed in the Court of Appeals. Numerals not followed by "A" and references to "App" are references to the Government's Petition for a Writ of Certiorari.

2. There is nothing in *Shillitani v. United States*, 384 U. S. 364 (1966), relied upon by the Government in its Petition in *Egan*, Oct. Term, 1971, No. 71-263, to support its argument that it had 90 days rather than 30 days. Indeed, in *Shillitani*, the petition was apparently allowed after 30 days only because Mr. Justice Harlan had granted an extension of time. See Brief for the United States in *Shillitani* at p. 2.

III.

QUESTIONS PRESENTED.

1. Whether procedural due process was denied petitioner where she, a grand jury witness, was given only fifteen (15) minutes notice as to a hearing on an immunity application, where the application was immediately granted without opportunity to prepare and argue objections and where the opportunity to present defenses and mitigating facts at a contempt hearing held shortly thereafter was summarily denied.

2. Whether a grand jury witness can refuse to answer questions which solely cover crimes not within the authorizing sections of 18 U. S. C. § 2514, the statute under which immunity was granted.

3. Whether 18 U. S. C. § 2514, as applied by the district judge, violated rights granted petitioner by the Fourth and Fifth Amendments.

IV.

STATUTES INVOLVED.

18 U. S. C. § 2514, 18 U. S. C. § 2516, and 28 U. S. C. § 1826, the pertinent provisions of which are set forth in Appendix B, hereto, *infra*, pp. 15-18, and the Fourth and Fifth Amendments to the Federal Constitution.

V.

STATEMENT OF THE FACTS.

This Court has before it in *Egan*, Oct. Term, 1971, No. 71-263, a petition for a writ of certiorari filed by the Government asking review of the holding of the court below as it relates to illegal electronic surveillance of a grand jury witness. Respondent's Brief In Opposition to that Petition sets forth the operative facts of this case, See Respondent's Brief in Opposition, *Egan*, Oct. Term, 1971, No. 71-263 pp. 3-8. Thus the Statement of Facts in this Conditional Cross Petition will be confined to those facts directly relevant to the issues respondent seeks to raise by Conditional Cross Petition.

As summarized in Respondent's Brief in Opposition in *Egan*, Oct. Term, 1971, No. 71-263, the Government in this case originally sought, obtained, and then abandoned a grant of statutory "use" immunity under 18 U. S. C. §6003. *Within a time period of approximately five (5) hours after abandonment of 18 U. S. C. §6003 and shift to 18 U. S. C. §2514 immunity, respondent was "immunized" and subsequently committed to prison for refusal to testify.* The relevant facts herewith are as follows:

In the late afternoon of Tuesday, January 26, 1971 (51A), Sister Jogues Egan, Cross-Petitioner, was adjudged in contempt of court by the Honorable R. Dixon Herman, sitting in the Federal District Court for the Middle District of Pennsylvania. This contempt order was entered following her refusal to give testimony before a then sitting grand jury, which testimony was ordered (7A) following the Government's application for immunity, and grant thereof by Judge Herman, under Title 18 U. S. C., §2514. The five-day notice provision of Rules 5(a), (b) and 6(d) of the Federal Rules of Civil Procedure was ig-

nored with respect to the application for immunity. In addition, counsel for Appellant was refused permission by the Court to present defenses to the contempt citation (69A-74A), which, in turn, was based on the unsworn testimony of the stenographer (56A).

The immunity order had been signed by the Court approximately forty minutes after counsel to Appellant was informed by the Government that the Application had been made, and that the Court would hear the Application "immediately." (Counsel was served with the Application at 10:00 a.m., January 26. The Court convened at 10:15 a.m. (23A)).

Prior to signing the immunity order, the district court permitted counsel to discuss the matter briefly. During the course of this discussion, counsel repeatedly stated that he did not have the 1968 immunity statute (§ 2514) before him, needed time to read it carefully, and that, in fact, he was being forced to argue "out of my head" (28A, 29A, 30A, 31A). Indeed the undated authorization letter from Will Wilson, Assistant Attorney General (10A), was not even given counsel until all parties were in the courtroom for the hearing. After the immunity order was signed, counsel, in the company of the Government's attorney, went to the Court's chambers and voiced additional objections both to the applicability of the immunity statute and the lack of adequate notice [3] and time to prepare argument (41A-50A). The Court, in overruling all of counsel's objections specifically conceded, "Whether you have had sufficient notice this morning that this new application was to be made in your opinion, I don't know." (49A).

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3. No request was made by the Government, and no reason was given for shortening the 5-day requirement of Rules 5(a), (b), 6(d), Fed. Rules Civ. Procedure. See *In Re Bart*, 304 F. 2d 631, 637 (1962).

Shortly thereafter, Petitioner was once more brought before the grand jury. She refused to testify, asserting, *inter alia,* that her counsel had been given inadequate time to prepare and argue objections to the immunity grant.[4]

Minutes after her refusal to testify, Appellant was brought back before the judge and, after being instructed to answer the questions and refusing to answer the questions, she was held in contempt. Appellant stated to the Court that she was not in contempt and was not being disrespectful but that, in addition to the legal grounds already set forth, her conscience compelled her not to answer. The Court *agreed* with her (76A) but nevertheless ordered that she be turned over to the United States Marshal and held in prison until she testified or until the end of the life of the grand jury, a period which could conceivably last eighteen months. See 28 U. S. C. § 1826.

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4. Among the issues raised by the immunity application were the following: Whether § 2514 immunity can be used to compel testimony when one or more of the crimes being investigated are not specified in the authorizing provisions of § 2514; whether § 2514 immunity may be authorized prospectively, that is, can the authorization to a United States Attorney to seek immunity be given *prior* to the time the witness has actually refused to testify. Cf. *In Re McElreath,* 248 F. 2d 612 (D. C. Cir. 1957); *In Re Grand Jury,* 317 F. Supp. 792, 795, *aff'd.* on other grounds, — F. 2d —.

Petitioner's counsel had literally no time to ascertain and develop these issues before the district court. As to the first of these issues, it later appeared that the failure of the district court to exclude grand jury inquiry into non-specified crimes is in direct conflict with *Marcus v. United States,* 310 F. 2d 143, 146 (3rd Cir. 1962), *cert. denied* 372 U. S. 944 (1964) and *Harris v. United States,* 334 F. 2d 460, 464 (1964) *rev'd on other grounds,* 382 U. S. 162 (1965).

In addition is the issue whether 18 U. S. C. § 2514 as interpreted and applied by the district court violates petitioner's fourth and fifth amendment rights.

VI.

REASONS FOR GRANTING THE WRIT.

1. This Court last Term granted certiorari in a case which raised a procedural due process issue virtually identical to that of the instant case. *Licata v. United States*, 429 F. 2d 1177 (9th Cir. 1970), *cert. granted and judgment vacated as moot*, 400 U. S. 938 (1970). If the *en banc* opinion in *Egan* be construed as affirming that portion of the original panel opinion not dealing with the illegal surveillance issue, then this Court is once again presented with conflicting circuit court rulings on the issue.[5]

Licata, supra, was in direct conflict with *In Re Bart*, 304 F. 2d 631 (D. C. Cir., 1962). In *Bart*, the Court of Appeals for the District of Columbia reversed a judgment of civil contempt for refusal to testify before a grand jury after immunity had been imposed. In so doing, the court said (p. 637):

> ". . . Normally, the application and supporting documents should be served in accordance with the Rules. F. R. Civ. P., Rules 5(a), (b), 6(d). But, for good cause shown, the court may shorten the period of notice or vary its form . . . ."

The Court of Appeals for the District of Columbia was of the view that the judge, under a statute which requires court approval in order that immunity be effected, "is not a mere automaton, performing a ritualistic act." (p. 636). He must independently be satisfied that all the necessary preliminaries have been complied with (p. 637). This, because of the concern of Congress that the compulsory testimony statute not become a method for "wholesale 'immunity baths'" (p. 634) and because a compul-

5. The original panel followed the rule of *Licata*. See Appendix C, pp. 78-79, Government's Petition in *Egan*, Oct. Term, 1971, No. 71-263.

sory testimony statute (even if constitutional) imposes a very real and substantial infringement on personal rights (p. 635). Accordingly, such a statute must be given "a strict construction" and is to "be applied only after the necessity for so doing has been established." (p. 635). For "it is the judge, not the government attorney who makes the judgment." (p. 636). Congress interposed the Court before immunity can be effected for the *very* reason that it did not want the determination as to whether immunity should be granted to rest alone with the United States Attorney, not even with the concurrence of the Attorney General. (See S. Rep. 1097, 90th Cong.; 2 U. S. Code Cong. & Adm. News, 1968, p. 2184, pointing out that § 2514 is patterned after 18 U. S. C. 3486(c), the section involved in *Bart.*).[6]

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6. In House Report No. 2606, 83rd Congress, on S. 16, which became 18 U. S. C. 3486, the Committee said (2 U. S. C. Cong. & Adm. News [1954], pp. 3062 and 3065):

> "The power to grant immunity is one of tremendous responsibility, the exercise of which must be guarded by discretion and wisdom. All possibility of abuse must be obviated lest it become a loophole for the escape from punishment for the guilty. It must at all times be the perfect medium whereby a true balance between the need and right of the Government to obtain the necessary information to carry out its constitutional functions and the constitutional right of an individual not to incriminate himself." (sic)
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> * * *
>
> ". . . [B]efore the immunity is actually granted to the witness, the approval of the United States district court wherein the inquiry is being conducted is to be obtained. The court in reaching its decision will have the aid of the views and facts of both the congressional committee and the Attorney General."
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> * * *
>
> "In cases before a grand jury or a court, similar precaution exists. In such instances, if a United States attorney decides that in an authorized matter immunity should be granted to a witness who has claimed his privilege, that prosecutor, having adjudged such testimony to be necessary in the public interest, must first obtain the approval of the Attorney General for such grant and then apply to the court for the necessary instruction

2. The shabby treatment afforded Petitioner at both the immunity and contempt stages of the district court proceedings contravenes the letter and spirit of this Court's past rulings in such cases. Especially egregious was the district judge's refusal to allow defenses (69-74A) to the contempt citation. This request was refused despite the fact that the show cause order pursuant to which the contempt hearing was held provided specifically that the witness should "show cause . . . why she should not be adjudged and held in contempt of court." See also, 28 U. S. C. § 1826, the "recalcitrant witness" statute pursuant to which the witness was confined:

> "whenever a witness . . . refuses *without just cause shown* . . ." (Emphasis supplied.)

In addition, although the court treated the matter in the nature of a summary proceeding, the denial of the witness' right to present a defense was not required, cf. *Mayberry v. Pennsylvania,* 39 U. S. Law Week 4133; No. 121, October Term, 1970, and was in fact, a denial of due process, *In Re Oliver,* 333 U. S. 257, 273-278 (1948); *Shillitani v. United States,* 384 U. S. 364, 371 (1966); *Harris v. United States,* 382 U. S. 162 (1965); *Cooke v. United States,* 267 U. S. 517 (1925); *Holt v. Virginia,* 381 U. S. 131, 136 (1965). See also Title 18 U. S. C. § 2514 (referring to the charge of contempt as in the nature of a "prosecution"). The distinction between civil contempt and criminal contempt in this context is irrelevant. See *Oliver* and *Shillitani, supra.*

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6 (cont'd)
to the witness to testify or produce evidence. All conditions must be complied with before the grant of immunity can be given to the witness.

". . .

"In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other *independent* but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill." (Emphasis added.)

In addition, the district judge specifically acknowledged and agreed with Cross-Petitioner's statement that her failure to testify, in addition to legal grounds, flowed from her own conscience (76A).[7] Certainly the court's order of imprisonment for a period of eighteen (18) months ought to have been mitigated by this factor. Cf. *Harris, supra,* 382 U. S. at 166-167; *Cooke, supra,* 267 U. S. at 537. In fact her statement raises a serious doubt as to whether she was in contempt at all.

3. The general legal consensus has been and the Government had always agreed that there was no inherent power in the Government or the courts to grant immunity. Cf. *Ellis v. United States,* 416 F. 2d 791, 798 (D. C. Cir. 1969); see also, *Ullman v. United States,* 350 U. S. 422, 431 (1956). Thus the Government would have to point to a specific statute which granted such immunity *in connection with the crime being investigated* and follow the procedure of that statute. In an attempt to avoid this, the Government persuaded the Congress to enact the Organized Crime Control Act of 1970, including §§ 6002, 6003, which permits the Government to seek immunity in *any* case. This statute, however, granted only use immunity and not transactional immunity and for that reason clearly raised issues of the most substantial kind. See *Stewart v. United States,* and *Kastigar v. United States,* 440 F. 2d 954 (9th Cir. 1971) (decided together), *cert granted,* Oct. Term 1970, No. 1562. In the case at bar, the Government for the first time is attempting to develop a new technique: It wishes to investigate for certain crimes not covered by an authorizing statute; it then adds offenses which *are* covered by the

7. SISTER EGAN: I would just like to say that in addition to what I have already said to the grand jury, I have no desire to stand in contempt of this Honorable Court; but I believe I have a duty to obey my conscience and my principles or stand in contempt of a court which, I respectfully submit, is higher than any United States Court.

THE COURT: I agree with you on that.

authorizing statute but asks the same questions, most of which involve crimes not within the authorizing section. It seeks to use § 2514 transactional immunity by unilaterally expanding the scope of that statute. If the Government can successfully use this technique, it has in effect created an immunity statute dealing with all crimes even though Congress had not given it such power. The question of whether to allow such executive usurpation of a legislative function clearly raises substantial separation of powers questions which should be resolved by this Court.

4. Even if this Court determines that § 2514 can be so used, it should make it clear that the district judge has the duty to screen the questions and not permit questions to be asked which deal solely with crimes not in the authorizing section of § 2516. Not to so limit the questions is in direct conflict with *Marcus v. United States,* 310 F. 2d 143, 146 (3rd Cir. 1962), *cert. denied* 372 U. S. 944 (1964); *Harris v. United States,* 334 F. 2d 460 (2nd Cir. 1964), *reversed on other grounds,* 382 U. S. 162 (1965).

5. This conditional cross petition also presents the reoccurring question of whether even a transactional immunity statute is constitutional. When this Court originally upheld such a statute, it was by a five-to-four vote in *Brown v. Walker,* 161 U. S. 591 (1896). This Court has never accepted with unanimity the holding in the *Brown* case that the fifth amendment right can be taken away merely by offering immunity. See dissenting opinions of Mr. Justices Black and Douglas in *Ullman v. United States,* 350 U. S. 422 (1956). In any event it would violate fourth amendment rights to permit the Government to inquire about crime not covered by the authorizing section of the immunity statute (here § 2514) invoked as the basis for granting immunity.

6. Section 2514 permits an application for immunity to be made only upon the written approval of the Attorney

General of the United States. The statute requires the Attorney General to consider the factual situation *after* the fifth amendment privilege has been invoked and make a determination whether it is necessarily in the public interest to grant immunity. The statutory language clearly states that this determination can be made *only after* the witness has first claimed her immunity. In the case at bar, however, it is clear that the undated letter used to support the Application under § 2514 was issued *before* the witness had claimed her immunity. This is contrary to *In Re Grand Jury Investigation*, 317 F. Supp. 792, 795 (E. D. Pa. 1970) *aff'd.* — F. 2d — (3rd Cir. January 25, 1971); cf. *In Re McElreath, supra.*

VII.
CONCLUSION.

For the reasons stated above, this Court should grant this Conditional Cross Petition for a Writ of Certiorari if it either grants the Government's Petition in *Egan*, Oct. Term, 1971, No. 71-263, or if it grants the Government's Petition in *Evans-Fishlowitz*, Oct. Term, 1971, No. 71-256 with the intention of having the result in 71-263 abide the event in 71-256.

Respectfully submitted,

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Dated September 20, 1971.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 71-1088.

IN RE GRAND JURY PROCEEDINGS, HARRISBURG, PENNSYLVANIA.

IN THE MATTER OF: JOQUES EGAN, JOQUES EGAN,

Appellant.

(D. C. Misc. No. 835)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Argued January 29, 1971 and Submitted on briefs filed February 5, 1971.

Before FORMAN, ALDISERT and GIBBONS, *Circuit Judges.*
Reargued en banc April 5, 1971.

Before HASTIE, *Chief Judge,* FORMAN,* SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges.*

Order.

ORDERED that the 15th line of page 5 of the opinion filed herein on May 28, 1971, be and the same is hereby amended by the addition of the following sentence:

* Judge Forman was ill at the time these opinions were filed. He may wish to file a separate opinion later.

Since Sister Egan has not yet been afforded a hearing regarding her allegations of illegal electronic surveillance by the Government, for the purpose of this appeal we assume her allegations to be true.

FURTHER ORDERED that the 6th line of page 55 of the opinion filed herein on May 28, 1971, be and the same is hereby amended by substituting the words "footnote 15" for the words "footnote 9."

By THE COURT

ARLIN M. ADAMS,
Circuit Judge.

Dated: June 16, 1971.

APPENDIX B.

§ 2514. IMMUNITY OF WITNESSES.

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2516. Authorization for Interception of Wire or Oral Communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and as-

sault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishble under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or

has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 1826. Recalcitrant Witnesses.

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its intention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.